IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 25TH JANUARY 2007 / 5TH MAGHA 1928

WP(C).No. 2823 of 2007(J)

OS.159/1982 of MUNSIFF COURT, PUNALUR

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PETITIONER:

G.PRABHAKARAN PILLAI,
S/O.GOPALAN PILLAI, RESIDING AT CHAMACKALA VEEDU,
PANAYAMCHERI MURI, ANCHAL VILLAGE, PATHANAPURAM
TALUK, KOLLAM DISTRICT.

BY ADV. SRI.V.CHITAMBARESH
SRI.T.C.SURESH MENON
SRI.JIBU P THOMAS
SRI.SUNIL J.CHAKKALACKAL

RESPONDENT:

JAYASREE, D/O.RADHAMANI AMMA,
RESIDING AT JAYA VILASAM, PANAYAMCHERI,
PATHANAPURAM TALUK, KOLLAM DISTRICT.

BY ADV. SRI.T.S.JOHN
SRI.M.S.RADHAKRISHNAN NAIR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 25/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C)2823/07

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1: TRUE COPY OF JUDGMENT IN W.P.(C)14942/2006 ON THE FILE OF HIS HON'BLE COURT DATED 10.8.06.

EXTP2: TRUE COPY OF ORDER IN I.A.1087/06 IN O.S.159/1982 ON THE FILE OF COURT OF MUNSIFF, PUNALUR DATED 3.11.06.

EXT.P3: TRUE COPY OF APPLICATION IN I.A.81/07 IN O.S.159/82 ON THE FILE OF MUNSIFF COURT, PUNALUR DATED 10.1.07.

EXT.P4; TRUE COPY OF APPLICATION IN I.A.93/07 IN O.S.159/82 ON THE FILE OF MUNSIFF COURT, PUNALUR DATED 11.1.07.

/TRUE COPY/

PA TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

W.P.(C)NO.2823 OF 2007

DATED THIS THE 25th DAY OF JANUARY, 2007

JUDGMENT

A preliminary decree for partition was passed in O.S.159/1982 on the file of Munsiff Court, Punalur. After confirmation of preliminary decree by the appellate Court, petitioner purchased 67/80 shares from two of the sharers. In the final decree application, a Commission was appointed. Commissioner was directed to divide the property in accordance with the preliminary decree. Petitioner then filed an application to implead himself as a party. While it was pending, petitioner along with assignors filed W.P.(c)14942/06 before this Court contending that the building in the decree schedule property was constructed by petitioner and it is not partible and therefore the building has to be excluded. This Court as per Ext.P1 judgment directed Munsiff Court, Punalur to consider the impleading application filed by petitioner and also the contentions raised by him with regard to the exclusive right claimed over the building and whether the building is partible or not. Though respondent filed a review petition, this Court dismissed it. Ext.P1 judgment itself makes it clear that learned Judge did not express any opinion regarding the merits of the

case and the trial Court has to consider whether the building is partible or not on the basis of the materials to be produced. Petitioner and his wife were thereafter impleaded as defendants 4 and 5 as per order in I.A.1087/06 on 3.11.06. Petitioner filed, Ext.P3 application, to decide the question whether the building is partible or not, after permitting him to adduce evidence. He also filed Ext.P4 application seeking permission to receive the documents produced thereon. This petition is filed under Article 227 of Constitution of India for a writ of mandamus directing the Munisff to dispose of Exts.P3 and P4 applications, before taking up the application for passing the final decree and also to declare that Ext.P1 judgment has been complied only in part by Ext.P2 order and Exts.P3 and P4 applications are to be disposed.

2. Learned Counsel appearing for petitioner and respondent were heard.

3. Arguments of learned Counsel appearing for petitioner was that as per the preliminary decree and judgment, the disputed building was not directed to be divided and under Ext.P1 judgment this Court directed that question to be decided and therefore before considering the question whether the report submitted by Commissioner is to be set aside or to be referred back to Commissioner, question whether the building is partible or not is to be decided. Argument is that if the building is found to be not

partible, then the report and plan submitted by Commissioner necessarily had to be modified and therefore the trial Court has to be directed to dispose of Exts.P3 and P4 applications before deciding the acceptability of the report submitted by Commissioner

4. Learned Counsel appearing for respondent argued that petitioner is an assignee from the other sharers and that too subsequent to the preliminary decree passed and there was an order of injunction restraining alienation of the property and petitioner, who claims right as per an assignment subsequent to the disposal of the appeal, confirming the preliminary decree is not entitled to claim that existing building is not to be divided in accordance with the preliminary decree. Learned Counsel also argued that petitioner did not file any application to set aside the report submitted by Commissioner and therefore there is no merit in the petition.

5. Learned Counsel appearing for petitioner pointed out that the order of temporary injunction was granted at the appellate stage it will not operate after the disposal of the appeal and petitioner purchased the property only after disposal of the appeal and therefore the assignment was not in violation of the order passed by the appellate Court and as petitioner constructed the building, other sharers are not entitled to claim that the building is to be divided in between them and in equity petitioner is entitled to

get the land where the building stands alloted to the share of the assignors at the time of allotment.

6. Learned Counsel appearing for respondent then pointed out that petitioner in another suit has filed a written statement stating that he did not construct any building in the property. Whatever it be, these are matters to be considered by the trial Court, while considering the question whether the building is partible or not. In view of Ext.P1 judgment, learned Munsiff is bound to consider that question.

7. Then the question is whether that question has to be decided before considering the application now pending, to set aside the report submitted by Commissioner. Even if that petition is not filed by petitioner herein, Court is bound to consider the question whether the report submitted by Commissioner is to be confirmed or varied or modified. But I do not think that it is necessary to issue a direction to learned Munsiff to consider the question of acceptability of the report, only after entering a finding on the question whether the building is partible or not. As rightly pointed out by learned Counsel appearing for petitioner if it is found that the building is not partible, the report necessarily warrants modification. But learned Munsiff can consider all the questions together. If it is found that the building is partible, he can proceed to decide the acceptability of the report including the question whether it is to be

set aside or modified or to be referred back to file a further report. It is made clear that if it is found that the building is not partible, either the report may have to be set aside or the Commissioner has to be directed to submit a further report, in the light of the said finding.

Writ petition is disposed accordingly. It is pointed out by learned Counsel appearing for respondent that this Court has directed learned Munsiff to dispose the suit within a time frame and it was subsequently extended to 31.1.07. Learned Munsiff is directed to dispose the matter as expeditiously as possible and at any rate within three months from the date of receipt of a copy of this judgment.

M.SASIDHARAN NAMBIAR,JUDGE

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